No. 07-243

In the Supreme Court of the United States

ADRIANA MERCEDES BENAVIDES RIVERA, ET AL.,
PETITIONERS

v.

PETER D. KEISLER, ACTING ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly held that the Board of Immigration Appeals did not abuse its discretion in denying petitioners' untimely motion to reopen their removal proceedings based on allegations of ineffective assistance of counsel.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 5
Conclusion 12
Appendix 1a

TABLE OF AUTHORITIES

Cases:

Abdi v. *United States Att'y Gen.*, 430 F.3d 1148 (11th Cir. 2005) 3, 4, 6
Anin v. *Reno*, 188 F.3d 1273 (11th Cir. 1999) 4
Borges v. *Gonzales*, 402 F.3d 398 (3d Cir. 2005) 8, 9
Chen v. *Gonzales*, 415 F.3d 151 (1st Cir. 2005) 7, 8, 10
Coleman v. *Thompson*, 501 U.S. 722 (1991) 6
Hernandez-Moran v. *Gonzales*, 408 F.3d 496 (8th Cir. 2005) 8
Iavorski v. *United States INS*, 232 F.3d 124 (2d Cir. 2000) 9, 10
INS v. *Abudu*, 485 U.S. 94 (1988) 6
INS v. *Doherty*, 502 U.S. 314 (1992) 6
Irwin v. *Department of Veterans Affairs*, 498 U.S. 89 (1990) 4
Itturribarria v. *INS*, 321 F.3d 889 (9th Cir. 2003) 10
Jobe v. *INS*, 238 F.3d 96 (1st Cir. 2001) 7, 8, 10
Lawrence v. *Florida*, 127 S. Ct. 1079 (2007) 10
Link v. *Wabash R.R.*, 370 U.S. 626 (1962) 7

Cases—Continued: Page

Magala v. *Gonzales*, 434 F.3d 523 (7th Cir. 2005) 7
Mahmood v. *Gonzales*, 427 F.3d 248 (3d Cir. 2005) 9
Osei v. *INS*, 305 F.3d 1205 (10th Cir. 2002) 9
Pace v. *DiGuglielmo*, 544 U.S. 408 (2005) 10
Pervaiz v. *Gonzales*, 405 F.3d 488 (7th Cir. 2005) 9, 10
Piñeda v. *Gonzales*, 427 F.3d 833 (10th Cir. 2005) 9, 10, 11
Pioneer Inv. Servs. Co. v. *Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993) 7
Ray v. *Gonzales*, 439 F.3d 582 (9th Cir. 2006) 9, 10, 11
Riley v. *INS*, 310 F.3d 1253 (10th Cir. 2002) 9, 10
Scorteanu v. *INS*, 339 F.3d 407 (6th Cir. 2003) 8
United States v. *Beggerly*, 524 U.S. 38 (1998) 5
United States v. *Boyle*, 469 U.S. 241 (1985) 7
United States v. *Brockamp*, 519 U.S. 347 (1997) 5
Wainwright v. *Torna*, 455 U.S. 586 (1982) 7
Xhao v. *INS*, 452 F.3d 154 (2d Cir. 2006) 11

Treaty, statutes and regulation:

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85 2
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 2
8 U.S.C. 1229a(b)(4)(A) 6
8 U.S.C. 1229a(b)(5)(C) 2
8 U.S.C. 1229a(c)(7)(A) (Supp. V 2005) 2

Statutes and regulation—Continued: Page

8 U.S.C. 1229a(c)(7)(C)(i) (Supp. V 2005) 2, 5
8 U.S.C. 1229a(c)(7)(C)(ii) (Supp. V 2005) 2
8 U.S.C. 1229a(c)(7)(C)(ii)-(iii) (Supp. V 2005) 5
8 U.S.C. 1229a(c)(7)(C)(iii) (Supp. V 2005) 2
8 C.F.R.:
Section 1003.2(c)(2) 3
Section 1003.2(c)(2)-(3) 2

Miscellaneous:

Richard J. Pasch et al., National Hurricane Center, *Tropical Cyclone Report: Hurricane Wilma, 15-25 October 2005* (September 28, 2006) <http://www.nhc.noaa. gov/pdf/TCR-AL252005_Wilma.pdf.> 11

In the Supreme Court of the United States

No. 07-243

ADRIANA MERCEDES BENAVIDES RIVERA, ET AL.,
PETITIONERS

v.

PETER D. KEISLER, ACTING ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is not published in the *Federal Reporter* but is reprinted in 219 Fed. Appx. 869. The orders of the Board of Immigration Appeals (Pet. App. 7-10, 11-13, 14-15) and the oral decision of the immigration judge (App., *infra*, 1a-9a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 5-6) was entered on February 28, 2007. A petition for rehearing was denied on May 22, 2007 (Pet. App. 16-17). The petition for a writ of certiorari was filed on August 20, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, establishes the procedures by which an alien may move to reopen proceedings after the Board of Immigration Appeals (BIA) has issued a final order of removal. In general, the INA allows an alien to file only one such motion and specifies that "the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal." 8 U.S.C. 1229a(c)(7)(A) and (C)(i) (Supp. V 2005). The statute specifically excepts two kinds of cases from the 90-day deadline: in a case involving asylum or withholding of removal, there is "no time limit" for a motion to reopen involving a claim of "changed country conditions," 8 U.S.C. 1229a(c)(7)(C)(ii) (Supp. V 2005); and there is a 180-day time limit for a motion to reopen a proceeding in which a removal or deportation order was entered *in absentia*. 8 U.S.C. 1229a(b)(5)(C); 8 U.S.C. 1229a(c)(7)(C)(iii) (Supp. V 2005). The statutory time limits are mirrored in the regulations governing the reopening of proceedings before the BIA. 8 C.F.R. 1003.2(c)(2)-(3).

2. Petitioners are natives and citizens of Colombia. Petitioner Rivera entered the United States in 2003 on a P-1 employment visa. App., *infra*, 3a. On December 19, 2003, the Department of Homeland Security (DHS) issued a Notice to Appear in removal proceedings, alleging that Rivera had overstayed her visa. Admin. R. 249. At a hearing before an immigration judge (IJ), she sought asylum, withholding of removal, and protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. App., *infra*, 1a.

Rivera's husband, the other petitioner here, was included in the removal proceeding as a derivative asylum applicant. Pet. App. 2 n.1. The IJ denied petitioners' applications and ordered them removed to Colombia. App., *infra*, 9a.

3. Petitioners' counsel filed a notice of appeal with the BIA (Admin. R. 70, 72-74), but the BIA summarily dismissed their appeal in August 2005 for failure to file a brief or explanatory statement. Pet. App. 14-15. Petitioners, through their counsel, filed a motion to reconsider, asserting that they had in fact timely filed an appeal brief and proffering documents purporting to demonstrate this. *Id.* at 11-12. Noting numerous deficiencies in their evidence, the BIA denied the motion to reconsider on December 6, 2005. *Id.* at 11-13.

4. On May 12, 2006, petitioners, through new counsel, filed a motion to reopen, asserting that their prior counsel was ineffective in failing to file a timely brief with the BIA. Pet. App. 7. Petitioners claimed that, by meeting with new counsel, who "discussed and analyzed" their claim, they learned for the first time on January 1, 2006, that their prior counsel had been ineffective. Pet. 4. The motion to reopen was filed 157 days after the BIA's denial of their motion to reconsider, and 131 days after they had retained new counsel and discussed the case with him.

The BIA denied the motion to reopen. Pet. App. 7-8. In a short per curiam order, it explained that the motion was untimely because it was not filed within 90 days of the BIA's final decision. *Id.* at 7 (citing 8 C.F.R. 1003.2(c)(2)). The BIA noted that, under Eleventh Circuit precedents, the time limits for filing motions to reopen are "mandatory and jurisdictional" and thus "not subject to equitable tolling." *Id.* at 7-8 (citing *Abdi* v.

United States Att'y Gen., 430 F.3d 1148, 1149-1150 (2005), and *Anin* v. *Reno*, 188 F.3d 1273, 1278 (1999)).[1] The BIA further explained that, "[i]n any event," petitioners had not filed their motion until "well more than 90 days" after the date their new counsel had discussed and analyzed their claim. Pet App. 8.

5. Petitioners, through their new counsel, sought review of the BIA's decision in the Eleventh Circuit. Pet. App. 1. A unanimous panel of the court of appeals denied their petition for review in an unreported per curiam opinion. *Id.* at 1-4. Relying on the "controlling precedent in *Abdi*," the court rejected petitioners' argument that "equitable tolling principles should be applied" to their case "because [their initial] counsel was ineffective." *Id.* at 2, 4. The court concluded that the 90-day period for filing a motion to reopen with the BIA was not subject to equitable tolling, "even though" the

---

[1] In *Abdi*, the Eleventh Circuit held that the 90-day limit on filing a motion to reopen is "mandatory and jurisdictional, and, therefore, it is not subject to equitable tolling." 430 F.3d at 1150. It quoted this Court's explanation that equitable tolling is available "only sparingly," for example, "in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period," or has "been induced or tricked by his adversary's misconduct." *Id.* at 1149 (quoting *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 96 (1990)). The decision in *Abdi* also relied on the Eleventh Circuit's earlier holding that "the 180-day time limitation for motions to reopen" that applies to "*in absentia* deportation orders could not be equitably tolled on account of ineffective assistance of counsel." *Id.* at 1149-1150 (citing *Anin*, 188 F.3d at 1278). Although petitioners suggest that *Abdi*'s disallowance of equitable tolling "does *not* apply to a case of ineffective assistance of counsel," Pet. 13, that suggestion is belied by *Abdi* itself. See 430 F.3d at 1150 n.2 (declining, in light of its holding that the BIA had no discretion to grant an untimely motion to reopen, to "address [p]etitioner's point that his initial attorney rendered ineffective assistance in failing to file a brief * * * to support [his] appeal").

untimeliness may have been caused by "counsel's deficient performance." *Id.* at 3.

ARGUMENT

Petitioners contend (Pet. 7-13) that the Eleventh Circuit's decision declining to require the BIA to apply equitable tolling in the circumstances of this case was both erroneous and in conflict with the decisions of other courts of appeals. Further review is not warranted, because the Eleventh Circuit's unreported decision correctly rejected equitable tolling and no other court of appeals would hold on these facts that the BIA abused its discretion in refusing to invoke equitable tolling. Petitioners would thus be unable to obtain relief even if equitable tolling were sometimes available.

1. The BIA did not abuse its discretion in denying petitioners' untimely motion to reopen their removal proceeding.

The BIA and the Eleventh Circuit both followed *Abdi*'s holding that the 90-day time limit on filing a motion to reopen is not subject to equitable tolling. Pet. App. 3-4, 7-8. That is a sound interpretation of the applicable statute, 8 U.S.C. 1229a(c)(7)(C)(i) (Supp. V 2005), given the nature of motions to reopen and the fact that Congress has expressly exempted two classes of cases—but not petitioners'—from the 90-day limit, 8 U.S.C. 1229a(c)(7)(C)(ii)-(iii) (Supp. V 2005). Cf. *United States* v. *Brockamp*, 519 U.S. 347, 353 (1997) (concluding from context of tax statute that Congress intended to "decide explicitly whether, or just where and when, to expand the * * * limitations periods"); *United States* v. *Beggerly*, 524 U.S. 38, 48-49 (1998) (disallowing equitable tolling of limitations under the Quiet Title Act in light of other provisions in the statute). As

this Court has observed, "[m]otions for reopening" removal proceedings are "especially" disfavored because "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *INS* v. *Doherty*, 502 U.S. 314, 323 (1992); see *INS* v. *Abudu*, 485 U.S. 94, 108 (1988) (noting that automatically allowing aliens to initiate new hearings on the basis of "prima facie allegations" would "waste the time and efforts of immigration judges") (citation omitted). That consideration reinforces the conclusion that the statutory 90-day period for filing a motion to reopen cannot be extended where Congress has not so provided.[2]

2. Petitioners nonetheless assert that this Court should grant review on the basis of an alleged circuit split involving whether equitable tolling is available in situations where an alien claims that her failure to comply with the 90-day time limitation was due to the ineffectiveness or fraud of a privately retained attorney.[3] In fact, it is entirely likely that no court of appeals

---

[2] The court of appeals, in holding that equitable tolling was not available, characterized the 90-day period for filing a motion to reopen as "mandatory and jurisdictional." Pet. App. 3 (quoting *Abdi*, 430 F.3d at 1150). It is of no moment in this case whether the filing period is jurisdictional in the sense that it is not subject to forfeiture if an objection is not raised by the government in a timely manner and the BIA refuses to address it. Here, DHS (consistent with its general practice) did not file any response to petitioners' motion to reopen, but the BIA addressed the issue of timeliness. The central point in the text is that the 90-day limit is mandatory and not subject to equitable tolling.

[3] An alien in removal proceedings has a statutory right to be represented by counsel of the alien's choice at no expense to the government, 8 U.S.C. 1229a(b)(4)(A), but this Court has never held that the Constitution requires the government to appoint counsel for aliens in removal proceedings. In *Coleman* v. *Thompson*, 501 U.S. 722 (1991), a habeas corpus case, the Court held that, when the Constitution does not re-

would have held that the BIA abused its discretion in declining to apply equitable tolling on the facts presented here.

a. Three of the decisions that petitioners cite merely assumed without deciding that equitable tolling might be available and held that any equitable relief would be inappropriate in the circumstances presented. In *Chen* v. *Gonzales*, 415 F.3d 151 (2005), the First Circuit addressed the BIA regulation allowing an alien to file only one motion to reopen. It noted that an earlier en banc decision had "explicitly left open" the question "[w]hether equitable tolling is *ever* available to evade a filing limitation in the immigration context." *Id.* at 154 n.3 (citing *Jobe* v. *INS*, 238 F.3d 96, 100 (1st Cir. 2001)). It held that equitable tolling of (*i.e.*, an equitable excep-

---

quire the government to provide counsel, the ineffectiveness of privately retained counsel does not violate the Constitution. *Id.* at 754; see *Wainwright* v. *Torna*, 455 U.S. 586 (1982) (per curiam) (no basis for constitutional claim of ineffective assistance of counsel in seeking discretionary state supreme court review of criminal conviction, because there is no constitutional right to counsel in that setting).

There is no obvious reason that the result should be different in the removal context. As Judge Easterbrook has explained:

> The Constitution entitles aliens to due process of law, but this does not imply a right to good lawyering. Every litigant * * * is entitled to due process, but it has long been understood that lawyers' mistakes in civil litigation are imputed to their clients and do not justify upsetting the outcome. The civil remedy is damages for malpractice, not a re-run of the original litigation.

Magala v. *Gonzales*, 434 F.3d 523, 525-526 (7th Cir. 2005) (citations omitted). Indeed, this Court has repeatedly held in other contexts that a party is bound by counsel's errors in civil proceedings. See *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396-397 (1993); *United States* v. *Boyle*, 469 U.S. 241, 249-250 (1985); *Link* v. *Wabash R.R.*, 370 U.S. 626, 633-634 (1962).

tion to) the one-motion limit is "unavailable where a party fails to exercise due diligence," and that the alien there had failed to do so. *Id.* at 154 (quoting *Jobe*, 238 F.3d at 100).

In *Scorteanu* v. *INS*, 339 F.3d 407 (2003), the Sixth Circuit stated that it "need not decide * * * whether the [180-day deadline applicable to a motion to reopen an *in absentia* proceeding] is subject to equitable tolling," because the alien had exercised "insufficient diligence" to be eligible for it by waiting more than 180 days after retaining different counsel to file his motion. *Id.* at 413-414.

In *Hernandez-Moran* v. *Gonzales*, 408 F.3d 496 (2005), the Eighth Circuit cited the First Circuit's en banc decision in *Jobe* and held that the alien had not shown any "extraordinary circumstances" that could justify tolling the 90-day limitation for nine days. *Id.* at 499-500.

b. The Third Circuit's decision cited by petitioners, *Borges* v. *Gonzales*, 402 F.3d 398 (2005), dealt with a situation in which the alien's failure to file a timely and otherwise proper motion was the result of fraud. The alien alleged that his failure to attend his removal hearing had been due to ineffective assistance of counsel, and that his failure to file a timely motion to reopen his *in absentia* removal proceedings had been due to a paralegal's false statement that such a document had, in fact, been filed. See *id.* at 402. Taking care to note that the alien's argument was *not* "that ineffective assistance of counsel can or should constitute an 'exception' to the 180-day time limit," *id.* at 405, the court held that the period may be equitably tolled where an alien has been the victim of "fraud," which it defined as a situation in which the alien actually and reasonably relied "on false

representations of a material fact made with knowledge of [their] falsity and with intent to deceive the other party." *Id.* at 407 (citation omitted).[4]

Here, petitioners do not speak of "fraud" or allege anything that could fairly be characterized as "fraud" by their initial counsel. They say merely that he caused "prejudice to their interests," Pet. 4, that he failed to submit a filing fee with their motion to reconsider, Pet. 6, and that the BIA's record indicated he had not filed a brief or statement in their appeal, Pet. 3.

c. Petitioners are correct that the Second, Seventh, Ninth, and Tenth Circuits have stated that ineffective assistance of counsel may, at least in certain circumstances, justify equitable tolling of various statutory or regulatory limitations on motions to reopen removal proceedings.[5] But all of those decisions—*Ray* v. *Gonzales*, 439 F.3d 582 (9th Cir. 2006); *Piñeda* v. *Gonzales*, 427 F.3d 833 (10th Cir. 2005); *Pervaiz* v. *Gonzales*, 405 F.3d 488 (7th Cir. 2005); *Riley* v. *INS*, 310 F.3d 1253 (10th Cir. 2002); and *Iavorski* v. *United States INS*, 232 F.3d 124 (2d Cir. 2000)—predate this Court's recent clarification that "[a]ttorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in [a] context where [litigants] have no constitutional right to

---

[4] Petitioners also cite (Pet. 11) the Third Circuit's decision in *Mahmood* v. *Gonzales*, 427 F.3d 248 (2005). In *Mahmood*, which involved an untimely attempt to reopen an *in absentia* order, the court recognized its holding in *Borges*, but did not "attempt to define generally what qualifies as ineffectiveness sufficient to justify tolling," because it found that the alien's "lack of diligence" precluded tolling. *Id.* at 252 n.8.

[5] Petitioners cite three cases from the Tenth Circuit. Pet. 11. One of them, *Osei* v. *INS*, 305 F.3d 1205 (2002), never mentions equitable tolling at all.

counsel." *Lawrence* v. *Florida*, 127 S. Ct. 1079, 1085 (2007). As explained above (note 3, *supra*), an alien has no constitutional right to have counsel furnished by the government in removal proceedings, and therefore, under *Coleman*, has no constitutional claim of ineffective assistance of counsel. Accordingly, to the extent the decisions on which petitioners rely suggest that another court of appeals may have granted relief on the facts presented here, such a holding cannot survive *Lawrence*.

d. At any rate, it is highly unlikely that petitioners could have obtained equitable relief in any other circuit, even before *Lawrence*. The circuits that allowed equitable tolling still required the alien to exercise "due diligence." See *Ray*, 439 F.3d at 589 n.5 ("[E]quitable tolling * * * is appropriate * * * as long as the petitioner acts with due diligence.") (quoting *Iturribarria* v. *INS*, 321 F.3d 889, 897 (9th Cir. 2003)); *Piñeda*, 427 F.3d at 838 ("[T]he BIA must review Appellant's due diligence.") (quoting *Riley*, 310 F.3d at 1258); *Chen*, 415 F.3d at 153-154 ("[E]quitable tolling 'is unavailable where a party fails to exercise due diligence.'") (quoting *Jobe*, 238 F.3d at 100); *Pervaiz*, 405 F.3d at 490 ("[T]he test for equitable tolling * * * is whether the claimant could reasonably have been expected to file earlier."); *Iavorski*, 232 F.3d at 134 (holding that alien had "failed as a matter of law to exercise the requisite due diligence" for equitable tolling). That requirement is consistent with this Court's statements about tolling. See *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005) ("Generally, a litigant seeking equitable tolling bears the burden of establishing * * * that he has been pursuing his rights diligently.").

As the BIA found in this case (Pet. App. 8), petitioners would not be eligible for equitable tolling even if al-

legations of ineffective assistance of counsel were sometimes sufficient to authorize it. Petitioners concede that they retained new counsel, were advised of their "legal remedies," and had "actual notice of their problem" on January 1, 2006. Pet. 4, 6. Even assuming that their deadline could have been tolled until that date, they still did not file their motion to reopen for another 131 days. Cf. *Xhao* v. *INS*, 452 F.3d 154, 156, 160 (2d Cir. 2006) (allowing equitable tolling where motion to reopen was filed 88 days after retention of new counsel); *Ray*, 439 F.3d at 589 n.5 (allowing equitable tolling where motion to reopen was filed 44 days after petitioner had reason to know of prior ineffective assistance of counsel); *Piñeda*, 427 F.3d at 839 (holding equitable tolling unavailable when aliens submitted their motion more than 90 days after the date they belatedly received the administrative record).

Petitioners attribute their extra delay to Hurricane Wilma. Pet. 4-5, 13.[6] But they do not explain how the hurricane affected their ability (or their new attorney's ability) to file a motion to reopen. The 90-day time limit did not even begin to run until several weeks after the hurricane struck, and they first consulted with their new counsel more than two months after the hurricane. The facts petitioners present do not establish that they exercised due diligence.

---

[6] Petitioners ask the Court to take judicial notice of Hurricane Wilma. Pet. 5. Reliable government reports indicate that Hurricane Wilma crossed southern Florida on the morning of October 24, 2005. See, *e.g.*, Richard J. Pasch et al., National Hurricane Center, *Tropical Cyclone Report: Hurricane Wilma, 15-25 October 2005*, at 2 (Sept. 28, 2006) <http://www.nhc.noaa.gov/pdf/TCR-AL252005_Wilma.pdf>.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

DONALD E. KEENER
ALISON R. DRUCKER
Attorneys

OCTOBER 2007

APPENDIX

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
333 South Miami Avenue, Suite 700
Miami, Florida 33130

File Nos.: A 97 199 661
A 97 199 662

IN THE MATTERS OF ADRIANA MERCEDES BENAVIDES-RIVERA AND ANDRES MAURICIO MEJIA-VELA, RESPONDENTS

IN REMOVAL PROCEEDINGS

June 28, 2004

CHARGE: Section 237(a)(1)(B)—overstay.

APPLICATIONS: Section 208(a)—asylum; Section 241(b)(3)—withholding of removal; withholding of removal under Article 3 of the U. N. Convention against Torture.

ON BEHALF OF RESPONDENTS:

Nicholas A. Olano, Esquire
255 East Flagler Street
Third Floor
Miami, Florida 33131
(305)377-9331

ON BEHALF OF DHS:

William C. Cox, Esquire
Assistant Chief Counsel
333 South Miami Avenue
Suite 200
Miami, Florida 33130

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondents in this case are a married couple, both natives and citizens of Colombia who were issued Notices to Appear (*See* Exhibits 1) by mail, on or about January 9, 2004. The respondents appeared previously before the undersigned on March 5, 2004, and at that time admitted the allegations contained on the Notices to Appear and conceded removability.

The respondents did not immediately designate a country of removal and accordingly, the Court designated Colombia for them.

The Government submitted evidence of country conditions (*See* Exhibit 3). The respondent submitted a Notice of Filing, with information relating to targeted and vulnerable groups in Colombia (*See* Exhibit 4). Additionally, the respondents submitted copies of evidence (*See* Exhibit 5) to the Court. The respondent did not submit authenticated documents in accordance with the regulations. 8 C.F.R. Section 1287.6 (2004).

The sole issue today is whether or not the respondents are eligible, both statutorily and in the exercise of discretion, for the relief that the respondents seek.

TESTIMONY

The lead respondent was the only person to testify today in support of her application. She testified that she was a lawyer in Colombia and that she obtained her credentials in 1997. She testified that she last left her country on March 27, 2003, and came to the United States on a work visa, specifically a P-1 visa. She testified that she is married to the consolidated respondent and they recently had a child, who was born in the United States.

She testified that her father is deceased and that her mother resides in Colombia. She testified that she has two siblings that are also in Colombia at this time, in the town of Pasto.

The respondent testified that she last lived in Bogotá and, as stated, her highest level of education was a law degree. She testified that she studied law at the National University. She testified that she graduated on June 30, 1997, and when asked about her first employment as a lawyer she testified that she was employed at the National Penitentiary Institute of Colombia. She was asked how she obtained that job and she replied that it was through a political contact named Adolfo.

The respondent testified that this group was the government agency that administers the jails. She testified that she was a legal advisor to the general administration. When asked what she did specifically, she testified that she advised the general administration on legal matters and coordinated various committee meetings with the programs for the directors. She was asked who she worked with and she testified, "the general secretaries and chief of the general office."

The respondent also testified that there was a committee by the name of "Working Tables." She testified that she coordinated meetings for this committee, received all of the information and then dealt with health, food and other solutions to problems with the jails, and the process of incarceration. She was asked if she had problems because of her position. She testified affirmatively, stating that she had problems with the paramilitary groups that called themselves the Self Defenses of Colombia. She testified that she was accused of being a guerrilla member.

She testified that she was threatened at a meeting on April 22, 1999, and that she received her first letter threatening her with death. She testified that the directive was from the group and that there were many people that she had become acquainted with, including the chief of police and the chief of the courts, yet none of these people were able to help her. She testified that she was advised to change her residence, change her phone number and identify a different way to get home from work.

The respondent testified that these contacts informed her that she had problems and because of this she got ill. She testified that she received an illness which dealt with the left side of her face and palsy. She testified that she had changed addresses four times, as well as her telephone number. She was then asked what happened with her job and she testified that she resigned.

The respondent testified that she then went to the New Rainbow Corporation. She testified that these individuals that ran it were victims of the guerrillas. She testified that the New Rainbow Corporation had to do with the Social Democratic Party, and that individuals

came back to society. She was asked what she did with the New Rainbow Corporation and she testified she offered legal advice and services to the group due to social conflicts that occurred in Colombia. She was asked if she had problems while working with the New Rainbow coalition, to which she testified affirmatively.

She testified that she received a condolence letter on November 6 of 2001. She was asked if she had problems after this and she testified affirmatively, stating that she had been declared a military objective. She was then asked if she had any other problems and she testified affirmatively, stating that she had left the New Rainbow Corporation with her driver. She testified that two individuals on a motorcycle intercepted them and they made a gesture as if they were reaching for a weapon. She testified instead they had a rock which was thrown through the driver's side with a note that said, "AUC."

The respondent testified that the driver took her to the audiovisual office and told her to take a vacation. The respondent testified that she went to her mother's house in Pasto where they "found me again and threatened me with death." The respondent was asked if she reported this incident to the police and she testified yes, in Pasto. She then testified that she went to Bogotá.

She testified that in Bogotá she was given the option to seek asylum in Canada. She testified that the months went by and nothing happened. She testified that then the best thing she could do was to leave the country.

On cross-examination, the Government asked the respondent if she ever followed up on her claim in Canada. She testified that she talked to the representative, named Jorge Munoz, and he stated that the papers were filed and there was still no answer.

The respondent was asked in redirect examination where she filled out her petition for protection in Canada. She testified that it was through an association that was affiliated with the United Nations.

The respondent made closing argument and the Government waived closing argument.

STATEMENT OF LAW

An applicant for asylum and withholding of removal has the burden of proof to establish that she, he or they, have been subject to past persecution, have a well-founded fear of persecution or have established a clear probability of persecution within the meaning of Section 208(a) and Section 241(b)(3) of the Immigration and Nationality Act. *See Matter of E-P-*, 21 I&N Dec. 860 (BIA 1997). *See also INS v. Elias-Zacarias*, 502 U.S. 478 (1992); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989); *Matter of Moqharrabi*, 19 I&N Dec. 439 (BIA 1987).

The respondent must show that the harm suffered or feared in the future was or would be inflicted on account of her, his or their race, religion, nationality, membership in a particular social group or because of political opinion. *See* Section 101(a)(42)(A) of the Immigration and Nationality Act.

In order to be a "refugee" in one's country, the respondents must show that reasonable internal flight alternatives are not available to them. The burden is on them to show that reasonable flight alternatives are not available as the individuals that they fear are not the official government of the country designated for removal. *See* 8 C.F.R. Section 1208.13 (2004).

Aliens seeking protection under Article 3 of the U. N. Convention against Torture and other cruel, inhumane or degrading treatment or punishment must establish that it is more likely than not that they would be tortured in the country designated for removal by a government official or someone acting under their consent or acquiescence. *See Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002). *See also* 8 C.F.R. Section 1208.18(a) (2004).

FINDINGS OF THE COURT

In this case, the Court finds that the respondents have not suffered persecution in the past and they failed to establish a well-founded fear of persecution in the future based on any protected ground.

In this case, the respondent contends that there are two bases upon which relief can be granted. One, through an imputed political opinion and also through her subsequent employment with the organization that she went to work at after having left the penitentiary job, which was part of the government. In this case, the Court finds that the respondent has failed to establish a well-founded fear of persecution in the future based on any protected ground.

The respondent contends that she has relocated in her country on four occasions after having been advised to do so. She testified that she obtained her first position through a political contact which caused her to have problems, beginning specifically in 1999. She then testified that she received a condolence letter in November of 2001 and that she was declared a military target because of this. She then testified that she was intercepted by a motorcycle, while being driven, and that this

motorcycle threw a rock through the driver's side window with a note attached, AUC.

From the time that the respondent first alleged she had problems in Colombia in April, 1999, the respondent remained in her country for approximately four years. In this case, the respondent testified that other than contracting palsy, which affected her face, nothing happened to her in Colombia. The Court finds that the respondent has failed to establish that anyone in Colombia is interested in her for any of the five statutory grounds for asylum.

It is well established that aliens who flee general conditions of violence and human rights violations in their countries do not qualify for asylum. In enacting Section 208 of the Act, Congress did not intend to confer eligibility for asylum on all persons who suffer harm from civil disturbances, random criminal activity and other conditions that necessarily have political implications. *See Campos-Guardado v. INS*, 809 F.2d 285 (5th Cir.), *cert. denied*, 484 U. S. 826 (1987).

Inasmuch as the respondents have failed to satisfy the lower burden of proof required for asylum, it follows that they have also failed to satisfy the clear probability standard of eligibility required for withholding of removal. *See INS v. Stevic*, 467 U.S. 407 (1984).

The evidence does not establish that if they were now to return to Colombia it is more likely than not that they would be subject to persecution on account of one of the five grounds specified in Section 241(b)(3) of the Immigration and Nationality Act.

The Court finds, further, that there is no credible evidence that a government official or someone acting un-

der their consent and/or acquiescence would torture the respondents if they were to return to Colombia at this time.

In this case, the events that the respondent described do not indicate that the government would acquiescence in or consent to the torture of them if they were to be returned at this time.

Accordingly, the following orders are hereby entered.

ORDERS

IT IS HEREBY ORDERED that the respondents' applications for asylum, withholding of removal under the statute and withholding of removal under the Convention against Torture be, and are, denied.

FURTHER ORDER

IT IS FURTHER ORDERED that the respondents be removed from the United States to Colombia on the charges contained in the Notice to Appear.

/s/ Rex J. Ford
REX J FORD
United States Immigration Judge